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Supreme Court, U.S.
FILED
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No. 95-296

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PAMELA J. MCLEOD,

*Petitioner,*

v.

OREGON LITHOPRINT, INC., dba
NEWS-REGISTER PUBLISHING CO., and
NEWS-REGISTER EMPLOYEES' INSURANCE PLAN

*Respondents.*

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

# RESPONDENTS' BRIEF IN OPPOSITION

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**STATEMENT PURSUANT TO RULE 29.1**

Respondents have no parent companies and no subsidiaries that are not wholly owned.

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## I. STATEMENT OF THE CASE

Petitioner claims that her employer and its health plan -- the respondents in these proceedings -- neglected to inform her that she had become eligible to apply, under the plan, for a cancer insurance policy from American Family Life Insurance Company ("AFLAC"). Two months later, her physician informed her that she had cancer. She then applied for the AFLAC policy, not disclosing her illness. AFLAC approved the application and issued the policy, but later rescinded when it discovered the pre-application diagnosis. Petitioner then filed this action against respondents under the Employee Retirement Income

Security Act (ERISA), 29 U.S.C. § 1001 et seq. See Pet. at 5a.

In her complaint, petitioner alleges that respondents breached a fiduciary duty under 29 U.S.C. § 1104(a)(1)(B) by failing to inform her of her right to apply for cancer insurance as soon as she was eligible. She seeks compensatory damages under 29 U.S.C. § 1132(a)(3)[1] equal to the benefits she would have received under the AFLAC policy if she had applied for it earlier, less the

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[1] That section reads:

> (a) *Persons empowered to bring a civil action*
>
> A civil action may be brought --
>
> . . . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

policy premiums. She also seeks compensatory damages for her emotional distress. See Pet. at 5a-6a and 16a.

The District Court granted respondents' motion for summary judgment on two grounds: first, petitioner is not a plan "participant" and thus lacks standing to bring an ERISA claim under Section 1132(a)(3); and, second, ERISA does not allow the relief petitioner seeks -- compensatory damages -- for the wrong she claims -- breach of a fiduciary duty under Section 1104(a)(1)(B). See Pet. at 17a-26a. The Court of Appeals for the Ninth Circuit disagreed with the first holding, see Pet. at 6a-8a, but agreed with the second, id. at 11a-12a, and so affirmed the judgment in all but

one particular.[2] As an additional basis for its ruling, the appeals court held that ERISA does not allow petitioner to bring an action on her own behalf rather than on behalf of the plan as a whole. Id. at 9a-11a.

Petitioner asked the Ninth Circuit to reconsider and, alternatively, to review the case en banc, but the court denied both requests. Pet. at 1a. Petitioner then filed a cert petition.

## II. SUMMARY OF ARGUMENT

The court of appeals held that petitioner could not proceed with this action because ERISA does not allow a plan participant to sue the plan

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[2] The court remanded the case to the District Court for further proceedings on Petitioner's tangential claim that Respondents failed to provide plan documents promptly upon request. Pet. at 12a-14a.

administrator on her own behalf, only on behalf of the plan as a whole, and, in addition, because ERISA does not allow the relief petitioner seeks (compensatory damages) under the provision she cites (Section 1132(a)(3)). This Court recently agreed to hear a case -- Varity Corp. v. Howe, ___ U.S. ___, 115 S.Ct. 1792, 131 L.Ed.2d 720 (1995) (case no. 94-1471) -- that raises the first issue here: whether a plan participant can bring an action individually. But that is not a reason, as petitioner contends, for the Court to hear this case as well, because even if the Court holds that a plan participant can sue in her own right, there is still the problem that petitioner is seeking relief which ERISA does not allow -- compensatory damages. On that question the law is settled.

Just two terms ago, in Mertens v. Hewitt Associates, 508 U.S. ____, 113 S.Ct. 2063, 124 L.2d 161 (1993), the Court held that damage awards are not available under Section 1132(a)(3). That being so, petitioner cannot continue her claims here, no matter how the Court rules in Variety Corp. v. Howe on the individual-right-of-action question. Unless the Court is prepared to overturn Mertens so soon after it was decided, it should decline to hear this case.

## III. ARGUMENT

The Court recently granted review in a case which raises the issue whether ERISA allows plan participants to sue for their own benefit, as opposed to the benefit of all participants, when the administrator breaches a fiduciary duty.

Varity Corp. v. Howe, supra. This case raises the same issue, and so petitioner asks the Court to review this case in conjunction with Howe. Pet. at 4. But this case raises another issue -- one on which the law is settled, and settled in a way that forecloses petitioner's claims. For that reason, the Court should decline to review this case notwithstanding Howe.

The other, dispositive issue is whether a compensatory damages are available in an action under 29 U.S.C. § 1132(a)(3). On that issue, the Court has already spoken. In Mertens v. Hewitt Associates, supra, the Court held that Section 1132(a)(3) does not permit damage awards.

Section 1132(a)(3) provides, inter alia, that an ERISA plan participant may

"obtain appropriate equitable relief" to redress a violation of ERISA or the plan. See note 1 at page 2 supra. Petitioner argues that "appropriate equitable relief" includes monetary relief in the form of compensatory damages. But Mertens holds otherwise.

The petitioners in Mertens were pension plan beneficiaries who claimed that the plan's actuary knowingly participated in a breach of duties which ERISA imposed on the plan's fiduciary, causing some loss of pension benefits. Maintaining that their claim sounded in equity, the petitioners argued that the actuary could be held liable for damages under Section 1132(a)(3). The Court disagreed:

> Petitioners maintain that the object of their suit is "appropriate equitable relief" under [Section 1132(a)(3)]. They do not, however,

> seek a remedy traditionally viewed as "equitable," such as injunction or restitution. (The Court of Appeals held that restitution was unavailable, . . . and petitioners have not challenged that.) Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages -- monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of legal relief. . . . And although we have never interpreted the precise phrase "other appropriate equitable relief," we have construed the similar language of Title VII of the Civil Rights Act of 1964 (before its 1991 amendments) . . . to preclude "awards for compensatory or punitive damages." . . .

113 S.Ct. at 2068 (emphasis in original; citations omitted).

The petitioners argued that the Court's reading of "equitable relief" was too restrictive and "faile[d] to acknowledge ERISA's roots in the common law of trusts," under which courts of

equity were empowered to award money damages. Ibid. The Court responded:

> The term "equitable relief" can assuredly mean, as petitioners and the Solicitor General would have it, whatever relief a court of equity is empowered to provide in the particular case at issue. But . . . "equitable relief" can also refer to those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages). . . .
>
> In the context of the present statute, we think there can be no doubt. Since all relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief not at all. We will not read the statute to render the modifier superfluous.

Id. at 2068-69 (emphasis in original).

The Court went on to reject the petitioners' fallback argument that Section 1132(a)(3) should be construed to permit claims for monetary relief in

order to promote ERISA's goal of protecting plan participants and beneficiaries. "[V]ague notions of a statute's 'basic purpose,' the Court said, "are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration. This is especially true of ERISA, an enormously complex and detailed statue that resolved innumerable disputes between powerful competing interests -- not all in favor of potential plaintiffs." Id. at 2071.

The Ninth Circuit followed Mertens in the case at hand. It held, consistent with Mertens, that petitioner could not bring an action for damages under Section 1132(a)(3), assuming she could bring any action in her own right. Unless the Court is prepared to reconsider Mertens

just two years after it was decided, it should decline to review this case.[3]

Petitioner tries without success to argue her way around Mertens. She contends that "appropriate equitable relief" under Section 1132(a)(3) must include money damages, because courts of equity have "traditionally granted any type of relief which is necessary to provide complete relief to remedy the

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[3] Petitioner notes that the Sixth Circuit, in Warren v. Society Nat. Bank, 905 F.2d 975 (6th Cir. 1990), allowed a retirement plan participant to seek damages under Section 1132(a)(3). This ruling, she says, conflicts with the Ninth Circuit's ruling in the case at bar, justifying Supreme Court review. Pet. at 6. What petitioner fails to note, however, is that Warren pre-dates Mertens and thus is no longer good law. There is no reason to believe that the Warren court, writing today, post-Mertens, would still approve damage awards in Section 1132(a)(3) actions. Thus, the alleged "conflict among the circuits" is illusory.

Petitioner also contends that the Ninth Circuit's decision in the instant case, disallowing legal relief under Section 1132(a)(3), conflicts with the Third Circuit's decision in Bixler v. Cent. Pa. Teamsters Health-Welfare Fund, 12 F.3d 1292 (3rd Cir. 1993). But here again there is no actual conflict. The Bixler court allowed the widow of a plan participant to bring an individual action under ERISA to recover her husband's medical expenses and death benefits, which, although monetary, is equitable, not legal, relief.

wrongs," and because "courts of equity have traditionally provided for the payment of money as a form of equitable relief." Pet. at 21 and 23.[4] But as noted above, the Mertens Court considered and rejected those very arguments, which are no more persuasive in this case than they were in that one. Without more -- and there is nothing more -- the Court should not grant review to rethink those arguments.

Petitioner tries to distinguish Mertens by noting that the defendant in that case was not an ERISA "fiduciary," as are the defendants here. Pet. at 15a. But that fact was not essential to the

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[4] Petitioner acknowledges that she seeks compensatory damages -- monetary relief for the losses she allegedly suffered as a result of respondents' failure to inform her of her eligibility for cancer insurance, as well as for her emotional distress over those losses. Pet. at 3. She does not contend that the money she seeks to recover from respondents can or should be characterized as restitutive or injunctive or as any other form of "traditional" equitable relief.

decision in Mertens holding, as the Mertens Court itself made clear. At the outset of its opinion, the Court noted that neither party had addressed the threshold question whether a nonfiduciary could be held liable under ERISA, let alone liable for damages. While expressing doubt that ERISA's remedies apply to nonfiduciaries, the Court nevertheless proceeded to determine the scope of those remedies: "[A]though we acknowledge the oddity of resolving a dispute over remedies where it is unclear that a remedial wrong has been alleged, we decide this case on the narrow battlefield the parties have chosen, and reserve decision of that antecedent question." 113 S.Ct. at 2067-68. That "narrow battlefield" was, of course, whether money damages constitutes

"appropriate equitable relief" under Section 1132(a)(3). Answering that question in the negative, the Court assumed that nonfiduciaries were subject to suit under Section 1132(a)(3) to the same extent as fiduciaries. And so the fact that the defendants in this case are fiduciaries while the defendants in Mertens were not is not a basis for distinguishing the two cases.

Finally, petitioner argues that "a major problem exists with the language of [Section 1132(a)(3)]" if it does not allow plan participants to sue for damages, because the participants will be left without a remedy for wrongful conduct by plan fiduciaries. Pet. at 8. In fact, plan participants are not remediless; they are entitled, of course, to "appropriate equitable relief" under

Section 1132(a)(3). If that remedy is inadequate in a substantial number of cases -- and petitioner has not shown that it is; she merely speculates to that effect -- then she should apply to Congress for an amendment to the law. It is not for the courts to correct perceived "problems" in statutory language, especially when the language is, as noted above, part of "an enormously complex and detailed statue that resolve[s] innumerable disputes between powerful competing interests." Mertens, 113 S.Ct. at 2071.

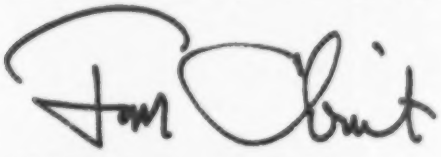
In sum, Mertens answers all of the questions petitioner now poses concerning the scope of relief under Section 1132(a)(3). There is nothing left for the Court decide and thus no reason for

it to hear this case. The Court should, therefore, deny review.

## IV. CONCLUSION

The Court should deny review.

Respectfully submitted,



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